INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Statute involved	2
Statement	4
Discussion	15
Conclusion	21

CITATIONS

Cases:

Cox v. *United States*, 332 U. S. 442 — 20

Dickinson v. *United States*, 346 U. S. 389 — 20

Gonzales v. *United States*, No. 69, O. T. 1954 — 15

Reed v. *United States*, 205 F. 2d 216, certiorari denied, 346 U. S. 908 — 19

Sicurella v. *United States*, No. 250, O. T. 1954 — 15, 16, 17

Simmons v. *United States*, No. 251, O. T. 1954 — 15, 17, 18

Tyrrell v. *United States*, 200 F. 2d 8, certiorari denied, 345 U. S. 910 — 19

United States v. *Gray*, 207 F. 2d 237 — 18

United States v. *Hartman*, 209 F, 2d 366 — 19

United States v. *Nugent*, 346 U. S. 1 — 18

United States v. *Taffs*, 208 F. 2d 329; certiorari denied, 347 U. S. 928 — 17

White v. *United States*, No. 390, O. T. 1954 — 15

Witmer v. *United States*, No. 164, O. T. 1954 — 15

Statute:

Universal Military Training and Service Act, 62 Stat. 604, 612; 65 Stat. 75, 86:

Section 6 (j) [50 U. S. C. App. 456 (j)] — 2

320610—54——1

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 391

JOHN ALAN TOMLINSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (2 R. 280–289) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on September 15, 1954 (2 R. 290). The petition for a writ of certiorari was filed on October 6, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the classification of petitioner by the selective service system as available for noncombatant service was without basis in fact.

2. Whether the court below erred in affirming the action of the trial court which, pursuant to examination of F. B. I. reports *in camera,* denied admission of the reports in evidence.

3. Whether denial of petitioner's claim for exemption from military service as a minister was without basis in fact.

STATUTE INVOLVED

Universal Military Training and Service Act, 62 Stat. 604, 612; 65 Stat. 75, 86:

> Section 6(j) [50 U. S. C. App. 456(j)]: Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously

opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local board, subject to such regulations as the Presi-

> dent may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate * * *. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. * * *

STATEMENT

Petitioner seeks review of a judgment affirming his conviction in the United States District Court for the Southern District of California for refusal to submit to induction into the armed forces for noncombatant service, in violation of Section 12 (a) of the Selective Service Act, 62 Stat. 604, 50 U. S. C. App. 462 (a) (1 R. 2–3). He was found guilty by the court without a jury and sentenced to four years' imprisonment (1 R. 42–43, 2 R. 271, 277).

Petitioner's record with the Selective Service System [1] may be summarized as follows:

[1] Petitioner's selective service file, admitted below as Government Exhibit 1, is lodged as an original exhibit with the Court. Numbers refer to the numbers pencilled at the bottom of the page.

On October 18, 1949, petitioner registered, giving his date of birth as August 13, 1931, and his occupation as that of baker (Gov. Ex. 1, pp. 1-2). In the questionnaire which he executed and returned on September 6, 1950 (Gov. Ex. 1, p. 4), he indicated that he was then a minister, that he "regularly" served as a minister, and that he had been a minister since July 6, 1941, when he was "formally ordained" by water immersion.[2] In the space in which petitioner was required to indicate the ecclesiastical official performing the ordination he indicated "Jehovah God," and the place of ordination as Millville, New Jersey (Gov. Ex. 1, p. 6). He further stated that he had three persons wholly or partially dependent upon him for support (Gov. Ex. 1, p. 7) and in the section relating to "Present Occupation" he indicated that he held the job of baker for a Los Angeles company where he did cooking and baking for wholesale distribution. He had been in this work for three years and expected to continue indefinitely in it. (Gov. Ex. 1, p. 7.) He was paid at the rate of $1.55 per hour and worked an average of 40 hours per week. Prior to this employment he had worked for ten years in his father's bakery. (Gov. Ex. 1, p. 8.) He had two years of high school education and had not graduated (Gov. Ex. 1, p. 9). Petitioner signed the space in which conscientious objectors indicate their claim to such status (Gov. Ex. 1, p. 10).

[2] At this time petitioner was ten years of age.

Petitioner attached a letter to his questionnaire in which he stated (Gov. Ex. 1, p. 12): "I am an ordained minister of the gospel and regularly serve as such before and after my secular work." He explained that he performed his ministry without pay and performed his secular work to support himself and three dependent sisters. He described his ministry as consisting of door to door calls, return calls to interested persons, street corner religious activities, Bible study with his parents and others in their home, reading and studying going to and from work, attendance at Theocratic Ministry School once a week where he learned to speak publicly from the platform, and attendance and study at the Kingdom Hall. He explained that in connection with his Theocratic Ministry School he had "given seventeen (17) discourses to date" or about one every other month. He also listened to the others give their discourses. Petitioner stated that his studying and preaching amounted to about twenty-two hours per week, his secular work as a baker about forty hours. (Gov. Ex. 1, pp. 12–14.) He also submitted a printed form prepared by the Watchtower Bible and Tract Society with his name inserted in pen certifying that he was an ordained minister (Gov. Ex. 1, pp. 15–16), and some literature of the Watchtower Bible and Tract Society setting forth some of the religious tenets of that faith.[3]

[3] There is also in the file a letter from petitioner's parents to the effect that they held Bible studies in their home, that

On September 18, 1950, he submitted the special form for conscientious objectors claiming that he opposed any form of military service (Gov. Ex. 1, pp. 20–23). As the nature of his belief he wrote, "I believe in Jehovah God as superior to all powers." He explained he had been taught his religion by his parents who were Jehovah's Witnesses, and that he gave expression to his views in house to house preaching. He indicated the name of the pastor or leader of his church as one Shield Halvajian. Petitioner also attached a lengthy letter to his special form (Gov. Ex. 1, pp. 24–28) in which he explained:

> Therefore, anyone who is a true christian or follower of Christ, cannot be a part of this world. For this reason I maintain a position of strict neutrality in regards to all wars waged by the nations of this world. While I object to participation in combatant and non-combatant service I do not object to the nations of this world in carrying on wars. That is their right as far as I am concerned and I have nothing to say in regards to such. Nevertheless, I must obey God rather than men * * *.

---

petitioner has been engaged in door to door religious activity since 1940 (when he was nine years old), that he studied in the Theocratic Ministry School where he had given seventeen "sermons" from the platform (Gov. Ex. 1, pp. 29–30). An affidavit of Shield Halvajian, the company servant of petitioner's congregation, stated that petitioner "occasionally gives discourses" to the congregation, and that he engages in house to house and street religious activities (Gov. Ex. 1, p. 31).

The gist of the letter was that as a minister he had made an agreement or covenant to do God's will, and that he could not "engage in war" on either side. He explained, however:

> Because of my position of neutrality it cannot be said that I am a pacifist. A pacifist is one who refuses to fight under any and all circumstances.
>
> * * * * *
>
> If a person attempts to harm me or my spiritual brothers and sisters I have the perfect right to defend myself and said spiritual brothers and sisters in behalf of the upholding of God's government.

He stated that he was a member of a company of Jehovah's Witnesses of which Shield Halvajian was company servant or minister but that he was assigned "a certain amount of territory for the express purpose of carrying on regular ministry work," and "I have had this territory for one year." He stated, "Since I regularly and customarily preach as a minister I am entitled to a minister's classification."

On October 5, 1950, petitioner was classified 1-A by his local board (Gov. Ex. 1, pp. 3, 11, 33). On October 11, 1950, he requested a hearing before that board for the purpose of explaining that he was "maintaining a position of strict neutrality" (Gov. Ex. 1, pp. 11, 32). The records of the local board contain the following (Gov. Ex. 1, p. 35):

Registrant presented facts of religious training, and belief. States that he is a Minister, but the Local Board feels that he does not qualify for such a classification, inasmuch as there has been no Theological training in a school, or background which would make him a minister. They feel that a Minister is one who has a regular following, and is Ordained.

When asked if he would protect his own family or himself, he stated that anyone harming him or his family he would protest, and that he would protect them, or defend his home, even to the point of killing. But he would not fight in the Army.

The members asked him if he would serve in a non-combatant capacity. He refused, stating this would be assisting the war. Was asked if he would serve as a Chaplain, but refused, but stated he would preach to anyone at anytime.

Board presented facts that if everyone refused to serve, we would not have the right of freedom of religion, and asked the registrant if he would wait until the enemy appeared in his own door-step before protesting. He refused to answer, only quoted from his books. Also quoted General Hershey's statements regarding Jehovah's Witnesses, stating that he claims they should be deferred as ministers. The Board feels that if he is going to have the rights as an American citizen he should serve the country.

Registrant now claims he has 3 sisters listed on his income tax report as dependents. Dependency not noted or requested before this time.

Works in Baking Company as secular work.

Case re-opened, but continued 1-A.[4]

On November 20, 1950, petitioner's local board temporarily continued his classification as 1-A, but reopened his case on the dependency claim (Gov. Ex. 1, p. 11).

On November 28, 1950, petitioner wrote his local board indicating his intent to appeal on the grounds of dependency, and that he was both a minister and a conscientious objector (Gov. Ex. 1, p. 36). On the same day he wrote the appeal board an extensive letter (Gov. Ex. 1, pp. 37–40) in which he reasserted the three bases of appeal. He claimed that he preached as a "customary vocation," and in support made various state-

[4] On the trial petitioner testified that the local board would not allow his witness Shield Halvajian, to come into the local board hearing with him (2 R. 170–171). That witness submitted an affidavit setting forth his testimony (Gov. Ex. 1, p. 31). He also testified before the Department of Justice hearing officer (2 R. 88, 90). Petitioner testified that he was not allowed to read passages from the Bible (which he had quoted at length in his other papers) (2 R. 181–182), and that the board indicated that they wanted to know what his position was in his own words (2 R. 193). On being asked by the local board if he would defend his family and friends, petitioner testified that he told the Board that he would (2 R. 184) "because I do believe in fighting and defending myself and friends and family, because they are of like faith."

ments, the general tenor of which was that all Jehovah's Witnesses are ministers. On the subject of dependency he stated he lived with his mother and father but that he was allotted three of his sisters to support. He explained that he made approximately $3,000 per year, and his father made $67 per week (Gov. Ex. 1, pp. 47, 49).

On reviewing petitioner's claims, the appeal board on April 19, 1951, denied him a 4–E (predecessor of 1–O) or any lower classification (Gov. Ex. 1, pp. 55, 57) and on May 3, 1951, forwarded his file for hearing before a Department of Justice hearing officer on the conscientious objector claim (Gov. Ex. 1, p. 57).

Petitioner was granted a hearing on March 8, 1952 (Gov. Ex. 1, p. 57), after being fully advised of his rights (Def. Ex. A–1). The report of the hearing officer (Gov. Ex. 1, pp. 58–59) reflects that petitioner appeared with Shield Halvajian as his witness—also a conscientious objector, who had served a sentence for not complying with the rulings of his draft board.[5] Petitioner testified he was then 20 years of age and single, that he had seven sisters whom he helped support, and one

[5] On the trial Shield Halvajian testified that he was questioned by the hearing officer (2 R. 86–90). Halvajian described himself as (2 R. 96) "the company's servant over the congregation where Mr. Tomlinson is associated." He stated also that (2 R. 97) "the company's servant is the one who has overcharge of all the duties of the minister of congregation, perhaps like the pastor has over his congregation."

brother who had been a paratrooper. His occupation was that of a baker. Petitioner's contention was in essence that he was a minister "and if he were taken away from this work to serve in the armed forces, the work of carrying the message would be hindered." He also claimed he would not kill. The hearing officer's report concludes (Gov. Ex. 1, p. 59):

> It appears to me, after thorough questioning, that this young man, influenced by the teachings of Jehovah's Witnesses, has the same reasoning followed by all other Jehovah's Witnesses who have appeared before me—namely, that they are carrying the message of God and must not be interfered with. However, I am not thoroughly convinced that he would not, if necessary, take life in order to protect his dear ones or himself, and I feel that self-preservation would be his first thought. Yet I do believe that he is sincere when states that he could not kill. On the other hand I feel that he could render great assistance to our government in some other capacity.
>
> I therefore recommend that he be given the classification of 1-A-O.

On April 30, 1952, the appeal board by unanimous vote classified petitioner 1-A-O which made him eligible for induction into the armed services for noncombatant duty only (Gov. Ex. 1, pp. 3, 11).

On May 14, 1952, petitioner sent a letter to the National Director attempting to appeal further

his 1-A-O classification (Gov. Ex. 1, pp. 61–66). In this letter he stated:

> If I were to go into noncombatant service I might as well go all the way and carry a gun along with all the others. To leave myself unarmed under such circumstances would be very foolish indeed, not because I am afraid to die, but because I have made an agreement or covenant with my God Jehovah to conscientiously carry out His instructions as contained in the Bible.

Since petitioner had no right to appeal from a unanimous decision of his appeal board, no further action was taken by the National Director.

On July 1, 1952, petitioner was ordered to report for forwarding to an induction station on July 18, 1952 (Gov. Ex. 1, p. 68). On July 21, 1952, petitioner refused to submit to induction (Gov. Ex. 1, pp. 87, 89).*

At the time of trial petitioner attempted to subpoena the confidential F. B. I. reports which had been available to the Department of Justice hearing officer. No reference to said reports had been made by the hearing officer in his recommendation to the appeal board. The Government moved for an order to show cause why the subpoena should not be quashed (1 R. 8–18). Extensive argument was had on whether their production was

* On July 21, 1952, petitioner filed a change of dependency form with his local board indicating that he had married on May 30, 1952, and that he now claimed two dependents rather than four (Gov. Ex. 1, p. 88).

mandatory (2 R. 3–23). The hearing officer testified that he could not remember what the procedure was in this case. He testified, however, that when asked by a registrant, his system was always to inform him of the contents of the F. B. I. report, whether good or bad. Further, whether or not he was asked, whenever he saw something in the report that might be against a registrant, he told them of it.[7] (2 R. 75.) On the trial it was developed that although petitioner received ample notice of his rights (2 R. 69–70, 100–101, 107), he made no request of the hearing officer for any information contained in the F. B. I. reports (see 2 R. 140).

The F. B. I. reports were produced by the Government and the court reviewed them *in camera*. The court then sustained the Government's objection to their admission into evidence on the ground of irrelevancy and immateriality. (2 R. 253.) On motion of petitioner the sealed exhibits were made part of the record on appeal (2 R. 253–254).[8]

The Court of Appeals unanimously affirmed the judgment of the trial court (Pet. pp. 22–33).

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[7] Petitioner erroneously paraphrases this testimony as follows (Pet. pp. 4–5) "During the personal appearance of petitioner before the hearing officer he read excerpts to Tomlinson from the F. B. I. report that were considered by him to be adverse and unfavorable." There is nothing in this record to indicate that there was any adverse material in the F. B. I. reports.

[8] These sealed F. B. I. records (Exs. B–1 through B–6) are lodged with this Court as original exhibits.

DISCUSSION

1. This case, and the companion case of *White* v. *United States,* No. 390, this term, are related to the cases in which this Court has already granted certiorari in that they involve the question of claims of members of Jehovah's Witnesses to exemption from military service as conscientious objectors. They differ, however, from three of those cases (*Simmons,* No. 251; *Gonzales,* No. 69 and *Witmer,* No. 164) in that issues as to the depth or sincerity of the registrant's adherence to the tenets of his sect, present in those cases, are not here involved. They also differ from these cases and the fourth case, *Sicurella,* No. 250, in that the registrants there were given a 1–A classification, *i. e.,* available for full military service, whereas these two petitioners were given a 1–A–O classification, *i. e.,* conscientious objector available for noncombatant military service only. The 1–A–O classification in these cases is in effect a finding by the selective service boards that the petitioners do have sincere personal religious scruples against killing entitling them to exemption from bearing arms. The boards have found merely that the religious scruples against killing are not the reasons for the registrants' refusal to do noncombatant work.

While the petitioners were classified 1–A–O by the selective service boards in both the *White* and *Tomlinson* cases, the reasons for the classification in the two cases are somewhat different. In

this case the hearing officer, in the portion of his report quoted *supra*, p. 12, in effect found that the primary motivation for petitioner's claim to exemption from non-combatant service was his belief that he should allow no governmental authority to interfere with what he conceived to be the duty of his ministry. The hearing officer found, we believe correctly, that this is not a ground for which Congress has provided exemption from military service.[9] If that were all that there were in this the case, the hearing officer, in line with the general policy then in effect which is discussed in our memorandum in *Sicurella* (pp. 11–12), would probably have recommended a 1–A classification. But, pursuant to the Justice Department's understanding that each case must be judged on its own facts, the hearing officer found that in this case the individual registrant did have sincere personal religious convictions against killing. Therefore, while the registrant was not entitled to exemption from all military service on the basis of his opposition to all governmental authority, he was entitled to have his individual religious scruples against killing recognized to the extent of being classified as a conscientious objector available for non-combatant military service only.

This case is different from those that are now before the Court, but the common factor of op-

[9] Congress has provided a separate exemption for ministers, also claimed by petitioner. See pp. 20–21, *infra*.

position by Jehovah's Witnesses on religious grounds to any military service is present. The decision of the Court of Appeals for the Eighth Circuit in *United States* v. *Taffs*, 208 F. 2d 329, certiorari denied, 347 U. S. 928, rested in part on this consideration, while the Court of Appeals for the Seventh Circuit in *Sicurella*, No. 250, rejected the rationale of the *Taffs* case. This Court's decision in the pending case may thus have a bearing on the disposition of this case. We therefore suggest that it would be appropriate to defer action on this petition until the other cases are determined.

2. Petitioner contends that the trial court erred in refusing to make available for petitioner's inspection certain F. B. I. reports on petitioner which were before the Department of Justice hearing officer. This is the same contention made by petitioner in *Simmons*, No. 251, this term. This case differs from *Simmons*, however, in that here it does not appear that there was any adverse material in the report and none was adverted to in the hearing officer's recommendation to the appeal board. It further differs from *Simmons* in that here the F. B. I. reports were produced by the Government and the trial court made an *in camera* examination of them and on the basis of this examination sustained the Government's objection to their admission into evidence as irrelevant and immaterial. In so doing the court referred to the public policy in the maintenance of the confiden-

tial character of the documents in the hands of the executive. (2 R. 252–253.)

As stated in the Government's brief in opposition in *Simmons* (pp. 15–17) and as the court below held, we think that this Court effectively ruled in *United States* v. *Nugent*, 346 U. S. 1, that under the statutory scheme and in the light of the confidential character of F. B. I. reports registrants have no right to inspect these documents at any time. We are, moreover, confident that the interests of justice have been more than fully satisfied where, as here, the Government produced the documents and the court examined them and found them irrelevant and immaterial to any issue in the case.

While we think the court below was correct in affirming the action of the trial court, we are obliged to note as we did in our *Simmons* brief in opposition (p. 16) that there is a series of district court decisions which hold that a registrant on trial for refusing to be inducted is entitled to have the F. B. I. reports produced for his examination.[10] Inasmuch as this Court's decision

[10] The decision below is not, as contended by petitioner, in conflict with *United States* v. *Gray*, 207 F. 2d 237, a decision by a different panel of the United States Court of Appeals for the Ninth Circuit. On the contrary, in the *Gray* case, which involved the security clearance procedures for a seaman, whose livelihood was at stake, the Court said, citing *United States* v. *Nugent*, 346 U. S. 1, that the defendant was not entitled to access to confidential security material in the dossier of the administrative board and held only that he was entitled to information as to the showing against him. (*Id.* at 242.) In this case the hearing officer testified that

in *Simmons* may have a bearing on the issue here presented, we suggest for this further reason that it would be appropriate to defer action on this petition until the Court has decided *Simmons*.

3. The other issues raised by the petitioner do not warrant further consideration. His claim that the local board took improper matters into consideration in originally classifying him 1–A is not legitimately in issue. Whatever error there may originally have been was corrected within the selective service system itself when the appeal board set aside the 1–A classification and reclassified petitioner 1–A–O. *Tyrrell* v. *United States,* 200 F. 2d 8, 11 (C. A. 9), certiorari denied, 345 U. S. 910; *Reed* v. *United States,* 205 F. 2d 216, 218 (C. A. 9), certiorari denied, 346 U. S. 908; *United States* v. *Hartman,* 209 F. 2d 366 (C. A. 9). The appeal board action was based not only on the showing previously made by petitioner in support of his several claims, but also on extensive new matter, and the report of a Department of Justice hearing officer who saw him, and could accurately probe the character and extent

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while he did not recall petitioner's case, his practice was to read any adverse information that might be contained in F. B. I. reports to the registrant at the hearing (2 R. 75). Moreover, it appears that while petitioner received ample notice of his rights (2 R. 69–70, 100–101, 107), he made no request of the hearing officer for any information contained in such reports (see 2 R. 40). Finally, it does not appear that the F. B. I. reports contained any information adverse to petitioner's claims.

of his conscientious objector claim. Short of some showing that the essential elements of a hearing of the sort required by the statutory scheme were not granted petitioner, the appeal board action obviates the necessity of considering errors in the initial hearing or of assaying the factual basis of the local board's classification.[11]

4. Petitioner's claim to be a minister is essentially a reiteration of the position rejected by this Court in *Cox* v. *United States*, 332 U. S. 442, 444–446, that all members of Jehovah's Witnesses are ministers. All that his file shows is that he is one of a group of congregants who engage in door to door and street religious observances, part-time Bible studies, the giving of occasional student discourses, and other activities of a similar group nature. He neither practiced these activities as a "vocation" (*Dickinson* v. *United States*, 346 U. S. 389, 395), nor was he in any sense a "leader" of a "religious faith." (*id.* p. 394). Apparently his role was precisely the

[11] At the trial petitioner attempted to relitigate the merits of various factual issues presented to his local board and to show errors in arriving at its decision. The trial court limited him in this line of testimony to the issue of whether the local board followed the procedures prescribed by statute (2 R. 189–192). Petitioner now contends that this ruling was in error, and that he should have been allowed to attack all aspects of the local board proceeding, and show that its members were biased against him (Pet. pp. 19–20). It is obvious, however, that the local board action, which was set aside, is not in issue in this case, and the trial court was correct in so holding.

same as that of all other members of his religious company of which he was concededly not the pastor or company servant. The record indicates that his vocation was secular, and he earned his substantial wages, not to further a ministry but to help his father and mother support a large family.

CONCLUSION

The decision below is correct on the facts and not in conflict with any decisions of other courts of appeals. Inasmuch, however, as it involves issues the determination of which may be affected by this Court's decision in other cases now pending before it, it is suggested that it would be appropriate for the Court to defer action on this petition until the pending cases are decided.

Respectfully submitted,

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